Artworld Advertising Sdn Bhd v Nor Azian Bt Mohd Salleh & Anor

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R1-25-100 OF 2000
RAUS SHARIF J
16 APRIL 2004

Labour Law — Employment — Compensation — Wrongful dismissal — Backwages — Employee obtained employment four months after dismissal — Whether wages earned post-dismissal to be deducted from backwages awarded

Labour Law — Employment — Dismissal — Dismissal on ground of poor performance — Whether incumbent for employer to prove that employee had been warned — Whether Industrial Court committed error in finding that no warning given

The first respondent was employed by the applicant as a marketing executive at a salary of RM1,800 per month. One year later, the applicant terminated the services of the first respondent. The first respondent filed a representation under s 20(1) of the Industrial Relations Act 1967 as she had considered her dismissal to be without just cause or excuse. In the Industrial Court, the applicant's witness ('COW-1') admitted that no written warning was given to the first respondent regarding her poor sale performance. COW-1 further testified that the first respondent had however been warned by the applicant's managing director. The managing director was not called as a witness.

The Industrial Court ruled that COW-1's testimony that the first respondent had been warned by the applicant's managing director was either hearsay, or a mere assertion without proof, and that the failure on the applicant's part on the imperatives of warnings was not a mere procedural impropriety but a substantive matter. Accordingly, the Industrial Court found in favour of the first respondent and ordered the applicant to pay the first respondent a sum of RM43,200 as backwages (RM1,800 for 24 months) and a further sum of RM6,300 as compensation in lieu of reinstatement (RM1,800 for three and a half years).

The applicant applied for an order of certiorari to quash the Industrial Court's award.

Held, dismissing the application:

(1) Prior to the dismissal of an employee on the ground of poor performance, as in this case, it was incumbent for the employer to prove that the employee had been warned and that the employee had been given sufficient time to improve himself and that, despite being given sufficient time, the employee had failed to sufficiently improve his performance (see para 7).

(2) The learned Chairman of the Industrial Court had made a finding of fact that there was no written warning given to the first respondent. With regard to the alleged verbal warning, the managing director was never called to testify in the Industrial Court. Thus, there was no

proof of the nature of warnings which had been given to the first respondent, except from the hearsay evidence of COW-1, which was rightly rejected by the learned Chairman. Thus, the Industrial Court did not commit any error on the issue of warnings (see paras 8 and 9).

(3) A deduction should be made on the backwages awarded to the first respondent because the first respondent was able to get alternative employment with a salary of RM600 per month, four months after the termination. As such, the amount of RM600 per month for 20 consecutive months should be deducted from the award in respect of the backwages (see para 14).

[**Bahasa Malaysia summary**

Responden pertama bekerja dengan pemohon sebagai eksekutif pemasaran dengan gaji sebanyak RM1800 sebulan. Setahun kemudian, pemohon telah menamatkan perkhidmatan beliau. Responden pertama telah memfailkan representasi di bawah s 20(1) Akta Perhubungan Perusahaan 1967 atas alasan beliau dibuang kerja tanpa sebab dan alasan yang munasabah. Di Mahkamah Perusahaan, saksi bagi pihak pemohon('COW-1') telah mengaku bahawa pemohon tidak memberikan amaran bertulis mengenai prestasi jualan buruk responden pertama. COW-1 seterusnya memberi keterangan bahawa amaran telah diberikan kepada responden oleh Pengarah Urusan syarikat pemohon. Pengarah Urusan tersebut tidak dipanggil sebagai saksi.

Mahkamah Perusahaan memutuskan testimoni COW-1 bahawa responden telah diberi amaran adalah kenyataan dengar cakap, atau semata-mata penegasan tanpa bukti, dan kegagalan pihak pemohon untuk memberikan amaran yang imperatif bukanlah kegagalan mematuhi prosedur yang remeh tetapi merupakan isu yang agak serius. Sewajarnya, Mahkamah Perusahaan membuat keputusan berpihak kepada responden pertama dan mengarahkan pemohon membayar responden pertama tunggakan gaji sebanyak RM43,000 (RM 1800 untuk 24 bulan) dan pampasan sebagai ganti pengembalian semula jawatan (RM1800 untuk 3½ tahun).

Pemohon telah memohon perintah certiorari untuk membatalkan award tersebut.

Diputuskan, menolak permohonan tersebut:

(1) Sebelum pemecatan seseorang pekerja atas alasan prestasi lemah, seperti di dalam kes ini, adalah penting bagi majikan untuk membuktikan bahawa pekerja tersebut telah diberi amaran dan pekerja tersebut telah diberi masa yang mencukupi untuk mempertingkatkan prestasinya, dan meskipun telah diberi masa yang mencukupi, pekerja tersebut masih gagal untuk meningkatkan prestasi dengan secukupnya (lihat perenggan 7).

(2) Pengerusi Mahkamah Perusahaan yang bijaksana telah membuat kesimpulan fakta bahawa tidak terdapat amaran bertulis yang diberikan kepada responden pertama. Berkenaan dengan tuduhan

amaran secara lisan, pengarah urusan tidak pernah dipanggil untuk memberi keterangan di Mahkamah Perusahaan. Oleh itu, tiada bukti mengenai sifat amaran-amaran yang telah diberikan kepada responden pertama, kecuali keterangan dengar cakap COW-1 itu adalah keterangan dengar cakap sahaja yang ditolak secara betul oleh Pengerusi yang bijaksana. Oleh itu, Mahkamah Perusahaan tidak melakukan apa-apa kesilapan tentang isu amaran-amaran tersebut (lihat perenggan 8 dan 9).

(3) Pengurangan mestilah dibuat ke atas tunggakan gaji yang diawardkan kepada responden pertama kerana responden pertama telah mendapat kerja alternatif dengan gaji sebanyak RM600.00, empat bulan selepas pemecatan beliau. Oleh yang demikian, sejumlah RM600 sebulan selama 20 bulan mestilah dikurangkan daripada award berkaitan dengan tunggakan gajinya (lihat perenggan 14).]

Notes

For cases on compensation, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 793.
For cases on dismissal, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 849-873.
For dismissal, see 7 *Halsbury's Laws of Malaysia* (2003 Reissue) para [120.093].

Cases referred to

IE Project Sdn Bhd v Tan Lee Seng (Award 56 of 1987) (refd)
Ireka Construction Berhad v Chantiravathan a/l Subramaniam James [1995] 1 ILR 11 (refd)

Legislation referred to

Industrial Relations Act 1967 s 20(1)

Norlaili (SB Cheah & Associates) for the applicant
P Vickneswaren (Murugavell Arumugam &Co) for the first respondent

Raus Sharif J:

[1] This is an application by Artworld Advertising Sdn Bhd ('the applicant') for an order of certiorari to quash Industrial Court Award No 481 of 2000 handed down on 11 September, 2000. In the said award, the Industrial Court found that Nor Azian bt Mohd Salleh ('the first respondent') was dismissed by the applicant without just cause or excuse. Accordingly, the Industrial Court ordered the applicant to pay the first respondent a sum of RM43,200 as backwages and a further sum of RM6,300 as compensation in lieu of reinstatement.

[2] Briefly, the factual background that led to this application by the applicant is as follows.

[3] The first respondent was employed by the applicant as a Marketing Executive on 17 February 1997 vide a letter dated 31 January 1997 (Exhibit 'TPE 1'). Under the terms of this letter of appointment, the first respondent

was required to serve a probationary period of three (3) months. The respondent starting salary was RM1,700 per month. She was duly confirmed in her position vide a letter dated 17 May, 1997 and her salary was increased to RM1,800 per month (Exhibit 'TPE 2'). However, vide a letter dated 23 January, 1998, the applicant terminated the services of the first respondent with immediate effect (Exhibit 'TPE 3').

[4] The first respondent being unhappy with the action of the applicant filed a representation under s 20(1) of the Industrial Relations Act 1967 ('the Act') as she considered her dismissal was without just cause or excuse. Pursuant to s 20(3) of the Act, the Honourable Minister of Human Resources, referred the matter to the Industrial Court for an award. The Industrial Court found in favour of the first respondent. Hence, the applicant is now challenging the award.

[5] The applicant has based its application on these grounds. In gist, the applicant's grounds may be summarised as follows:

(i) The issue of warnings.

(ii) Reinstatement not an appropriate remedy.

(iii) Post dismissal earning of the first respondent.

Findings

(i) The Issue of Warnings

[6] On the issue of warnings the learned Chairman of the Industrial Court found as follows:

> The Court has consistently laid down mandatory procedures to be followed in cases where Employees make accusations of inefficiency and unsatisfactory work performance against their employees where it involved dismissals based on these grounds. In *Rooftech Sdn Bhd and Holiday Inn* (Award 166 of 1986) the Court stated:
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> > 'Inefficiency which discloses a course of negative conduct no doubt is a sufficient ground for termination, but there must necessarily be sufficient proof that a procedure has been followed. Ordinarily, there must be sufficient written communication to the Claimant in order to establish inefficiency or poor performance before the Company can rely on it to justify dismissal'.
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> In *IE Project Sdn Bhd and Tan Lee Seng* (Award 56 of 1987) the Court stated:
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> > 'An employer should be very slow to dismiss upon the ground that the employee is found to be unsatisfactory in his performance or incapable of performing the work which he is employed to do, without first telling the employee of the respects in which he is failing to do his job adequately, warning him of the possibility or likelihood of dismissal on this ground, and giving him an opportunity of improving his performance. It is for the employer to find out from the employee why he is performing unsatisfactory and to warn him that if he persists in doing so he may have to go'.

In addition, see *Ireka Construction Berhad v Chantiravathan a/l Subramaniam James* [1995] 1 ILR 11.

In this case, whilst the claimant admits that the question of sales were brought out by the MD in the weekly meetings, she denies that she had been specifically or individually and verbally warned about her poor sales performance.

COW-1 admitted that no written warning was given to the Claimant. Even on the verbal warnings, she merely testified that she knew the MD had warned the Claimant. Either, this amounts to hearsay, or it is a mere assertion which lacks of proof, unless the MD himself is tested in his testimony before the Court, which is absent.

The failure of the Company on the imperatives of warnings is not mere procedural impropriety, it is a substantive matter. It is not as the Company claims that it did not consider the inefficiency and poor work performance as a 'Misconduct' – it is, but is a difference specie which requires special procedures. Hence, the rationale in the Ireka's or Rooftech's principles.

[7] The applicant submitted that the above finding of the Industrial Court is wrong in law. With respect, I am unable to agree. I share the view of the learned Chairman in holding that where an employer has decided to dismiss its employee on the ground of poor performance, as in this case, it is incumbent for the employer to prove that the employee has been warned and the employee has been given sufficient time to improve himself and if despite being given sufficient time, the employee has failed to sufficiently improved his performance.

[8] In the instant case, the learned Chairman made a finding of fact that there was no written warning given to the first respondent. With regard to verbal warning, the evidence only shows that the company's witness (COW 1) merely said that she knew the Managing Director had warned the first respondent. But the Managing Director was never called to testify in the Industrial court. Thus, there is no proof of the nature of warnings which had been given to the first respondent except from the hearsay evidence of COW2, which was rightly rejected by the learned Chairman.

[9] Thus, I am of the view that the Industrial Court did not commit any error on the issue of warnings.

(ii) Reinstatement not an Appropriate Remedy

[10] On the issue of reinstatement, the learned Chairman stated as follows:

The Court considers that reinstatement may not be an appropriate remedy as by now, since the claimant's termination in January 1998, the Company will have engaged other sales or marketing people to work for the Company.

On the other hand, the claimant is a single parent of three children, and was forced by circumstances beyond her control to secure a livelihood the soonest to meet her pressing situation.

She had managed to get alternative employment with a very much reduced salary of RM600 per month with commission, four (4) months after termination.

[11] In relation to the above findings, the applicant argues that the Industrial Court had taken into account evidence which were not proven. The alleged impugned fact is that the first respondent was a single parent of three children. With respect, the applicant's contention is without merit. From the notes of proceeding, that is, during the re-examination of the first respondent, she said the following:

> I have to maintain three children. I am a single parent, I needed employment to maintain my family.

[12] The evidence was clearly accepted by the Industrial Court. Thus, it can never be said that the Industrial Court has taken into account a fact which is not proven.

(iii) Post-dismissal Earning of the First Respondent

[13] The Industrial Court had decided to order the applicant to pay full backwages and compensation for the loss of employment as follows:

(a)	Backwages from termination to last date of hearing @ RM1,800 subject to 24 months limit	RM43,200
(b)	Compensation for loss of employment One month salary for every year of Service @ RM1,800 x 3½ years	RM 6,300
		RM49,500

[14] It is the submission of the applicant that deduction should be made on the back wages awarded to the first respondent because the first respondent was able to get an alternative employment with a salary of RM600 per month, four months after the termination. I am in agreement. Deduction should have been made for the post-earning of the first respondent. In this case, there is no dispute that the first respondent was gainfully employed elsewhere with a salary of RM600 per month, four months after her termination by the applicant. For that reason, this court made an order that RM600 per month for 20 consecutive months be deducted from the award in respect of the back wages.

[15] The other orders of the Industrial Court remain the same. In the circumstances of this case, I have also made an order for the applicant to bear only half of the costs of this application.

Application dismissed.

Reported by Lim Lee Na